APPEAL NO. 032141
FILED SEPTEMBER 18, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 11, 2003. The hearing officer determined that the appellant's (claimant) lumbar radiculopathy is not the result of the compensable injury; that the claimant did not have disability from October 1, 2002, through February 11, 2003; that the claimant's date of maximum medical improvement (MMI) and impairment rating (IR) cannot be determined because there is no MMI/IR certification from a designated doctor; that the Texas Workers' Compensation Commission (Commission) properly appointed a second designated doctor, Dr. Z; and the hearing officer declined to decide whether the respondent (self-insured) must pay impairment income benefits (IIBs) based on Dr. H's assigned IR as the designated doctor. The claimant appealed, arguing that the great weight of medical evidence shows that the claimant's lumbar radiculopathy is the result of her compensable injury; that the Commission erred in appointing a second designated doctor, Dr. Z; and that the self-insured should be ordered to pay IIBs in accordance with Dr. H's IR of 10% pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(k) (Rule 130.6(k)). The carrier responded, urging affirmance. The hearing officer's determination that the claimant had no disability from October 1, 2002, through February 11, 2003, was not appealed and is now final pursuant to Section 410.169.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____, while working as a cafeteria employee for one of the self-insured's schools. At a CCH on October 9, 2002, another hearing officer determined that the claimant's compensable injury "consisted of no more than a contusion and resulting muscle spasms to her lower back area" and that "she did not sustain an injury to her disc at the L4-5 spinal level of her lumbar spine on _____." That decision was appealed by the claimant and the Appeals Panel affirmed that hearing officer's decision in Texas Workers' Compensation Commission Appeal No. 022823, decided December 12, 2002. Subsequently, Dr. H was appointed as the designated doctor and certified that the claimant had reached MMI on February 11, 2003, with an IR of 10%. Dr. H considered claimant's herniated disc at the L4-L5 level and her right lumbosacral radiculopathy in determining the claimant's IR of 10%. The self-insured refused to pay IIBs on the basis that the designated doctor rated noncompensable injuries in arriving at his IR of 10%. The claimant filed a complaint with the Commission's Compliances and Practices Division regarding the failure to pay IIBs based on Dr. H's IR of 10%. Benefit Review conferences were held on April 28 and May 30, 2003. In a third letter of clarification, dated May 12, 2003, the benefit review officer (BRO) advised the

designated doctor that the compensable injury did not include an injury to the claimant's spine at the L4-5 disc level and requested that the doctor evaluate the lumbar contusion and resulting muscle spasms in accordance with Rule 130.6 (d)(5) providing "two separate evaluations…one with and one without the lumbar radiculopathy." Dr. H in his response dated May 28, 2003, stated that if the injury is a contusion "then it is the contusion and the resulting muscle spasms that caused the radiculopathy." Dr. H did not give a rating without the lumbar radiculopathy. The Commission appointed a second designated doctor, Dr. Z, on April 29, 2003. Dr. Z has not examined the claimant. The BRO issued an interlocutory order on May 30, 2003, mandating the self-insured to pay IIBs based on a 5% IR and the self-insured complied with this order.

PROPER APPOINTMENT OF SECOND DESIGNATED DOCTOR

It is well settled that the Commission can appoint another designated doctor in circumstances where the first designated doctor cannot or will not complete the process of determining the IR. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 941635, decided January 23, 1995. In Texas Workers' Compensation Commission Appeal No. 011607, decided August 28, 2001, the Appeals Panel noted that it has held that a designated doctor should not be replaced by a second designated doctor absent a substantial basis to do so, and that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) or *requests from the Commission for clarification*, or if he or she otherwise compromises the impartiality demanded of the designated doctor (emphasis added).

The hearing officer determined that Dr. H was unwilling to follow the Commission's instructions for performing his designated doctor responsibilities due to the doctor's perceived medical and ethical considerations, and that his status as the designated doctor was terminated by the appointment of Dr. Z as the designated doctor. An abuse of discretion is the standard to use in reviewing a decision to appoint a second designated doctor. Texas Workers' Compensation Commission Appeal No. 960454, decided April 17, 1996. An abuse of discretion occurs when a decision is made without reference to any guiding rules or principles. *See* Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986); *See also* Texas Workers' Compensation Commission Appeal No. 931034, decided December 27, 1993. Although neither the claimant nor the hearing officer specifically addressed the Commission's appointment of a second designated doctor in terms of an abuse of discretion by the Commission, it is clear by the claimant's position on appeal that she contends that the Commission abused its discretion in appointing another designated doctor. It is just as clear that the hearing officer decided that the Commission did not abuse its discretion in so doing. Having reviewed the record in this case, and applying the applicable abuse of discretion standard, we find that the hearing officer correctly concluded that the second designated doctor was properly selected.

MMI/IR CANNOT BE DETERMINED

The hearing officer did not err in determining that the issues of MMI and IR were not ripe for adjudication because there is no MMI/IR certification from the most recently appointed designated doctor. As discussed previously, the hearing officer did not err in finding that the second designated doctor, Dr. Z, was properly appointed by the Commission. Dr. Z has not yet examined the claimant and determined the claimant's MMI and IR. According to Rule 130.1(A), only authorized doctors may certify MMI and assign IR. Authorized doctors are doctors serving in the roles of treating doctors, required medical examination doctors, and designated doctors. *See* Rule 130.1. There is no evidence in the record of MMI certifications or IRs by any authorized doctor other than the certifications by Dr. H who is disqualified by the appointment of Dr. Z as the designated doctor. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

EXTENT OF INJURY

Extent of injury is a factual question for the hearing officer to resolve. It is the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)), who resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In this instance, the hearing officer was not persuaded that the claimant sustained her burden of proving the causal connection between her compensable injury and her lumbar radiculopathy. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain, *supra.*

CARRIER'S FAILURE TO PAY IIBS ACCORDING TO DR. H'S 10% IR

We decline to address the issue regarding the self-insured's failure to pay IIBs to the claimant based on the 10% IR assigned by Dr. H. Dr. H rated a noncompensable injury in arriving at his IR of 10% for this claimant and failed to give alternative ratings pursuant to Rule 130.6(d)(5). The self-insured disputed this IR and paid IIBs in accordance with the BRO's interlocutory order of May 30, 2003. The claimant has filed a complaint with the Commission's Compliance and Practices Division and we agree with the hearing officer's position that this matter is more appropriately addressed in that forum.

The decision and the order of the hearing officer are affirmed.

The true corporate name of the self-insured is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

RM
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Robert W. Potts
Appeals Judge